

DUNU (Migration) [2022] AATA 1980 (27 April 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Emeka Emmanuel DUNU
CASE NUMBER:	2001359
HOME AFFAIRS REFERENCE(S):	BCC2016/2116505
MEMBER:	Peter Emmerton
DATE:	27 April 2022
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl 801.221 of Schedule 2 to the Regulations

Statement made on 27 April 2022 at 12:57pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing relationship – validly married – financial, household and social aspects of relationship and nature of commitment – substantial time spent apart because of family obligations – open and honest oral evidence and documentary evidence – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cl 801.221

CASE

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 21 January 2020 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 21 June 2016 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 801.221 because they were not satisfied that the visa applicant and the sponsor were in a genuine relationship.
4. The applicant appeared before the Tribunal on 27 April 2022 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Bronwyn May Sandy, the sponsor.
5. The applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the couple are currently in a genuine spousal relationship as defined by 5F of the Act.
8. In determining the applicants' claims the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in doing so, the Tribunal is aware of the need and importance of being sensitive to the circumstances and the difficulties applicants often face before the Tribunal in their individual circumstances.
9. The applicants rely on the evidence given before the Tribunal together with written submissions and supporting evidence provided to the Tribunal and previously to the Department.
10. The Tribunal found all those giving evidence at the hearing appeared to be open and honest without any obvious obfuscation.

Whether the parties are in a spouse or de facto relationship

11. Relevantly to this matter, cl 801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

12. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

13. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were married on 16 May 2016, Court House, Mt Isa, Queensland, in a civil ceremony. A marriage Certificate was provided to the delegate at the time of application and this evidence is not in dispute. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

14. The applicant lodged a valid application for a Partner (Temporary) (Class UK) (Subclass 820) and Partner (Residence) (Class BS) (Subclass 801) visa on 21 June 2016.
15. The Partner (Temporary) (Class UK) (Subclass 820) was granted on 19 October 2017.
16. The applicant arrived in Australia on 19 May 2015. He is a male Nigerian citizen. DOB [Date 1], living in Australia.
17. The sponsor is a female Australian citizen, DOB [Date 2].
18. Both the sponsor and the visa applicant are therefore beyond the age of 18.
19. The applicant has travelled outside of Australia since arrival on 1 occasion, Nigeria, from 25 February 2022 until 20 April 2022. This was for compassionate family reasons.
20. The Tribunal has considered the documentary evidence provided to both the Department and the Tribunal. The Tribunal has had the benefit of taking oral evidence from the visa applicant and the sponsor.
21. The following additional evidence, Declarations / Statements were provided to the Tribunal.
- Commonwealth Bank disputed transaction letter re account/card ending 2346 – 14 June 2019
 - Commonwealth Bank disputed transaction letter re account/card ending 6718 – 17 April 2019
 - Commonwealth Bank disputed transaction letter re account/card ending 0376 – 8 April 2019

- Commonwealth Bank disputed transaction letter re account/card ending 2346 – 8 May 2019
- Commonwealth Bank disputed transaction letter re account/card ending 2346 – 20 May 2019
- Commonwealth Bank disputed transaction letter re account/card ending 2346 – 8 July 2019
- Joint Commonwealth Bank statement – account ending 7437
- Joint AGL electricity account March 2019, Dec 2019, March 2020, June 2020, September 2020, March 2021
- Form 888 stat dec by Tobenna Somadina Amechi – 24 Nov 2020
- Form 888 stat dec by Idika Mba Udum – 3 Feb 2021
- Form 888 stat dec by Festus Okwudiu Ngwu – 23 Nov 2020
- Form 888 stat dec by Victor Ikechukwu Umeh
- Statutory declaration by Ignatius Offia – 26 Nov 2020
- Joint AGL gas account Jan 2019, Oct 2019, Jan 2020, Apr 2020, Jul 2020, Oct 2020, Feb 2021
- Letter regarding sponsor request for applicant to be next of kin at Lyell McEwin hospital
- Bronwyn Dunu medical records
- Emeka Dunu AIA application – 31 October 2019
- Bronwyn Dunu AIA life insurance letter – 1 November 2019
- Photographs of applicant and sponsor at a varied range of social events
- Photograph of sponsor's medication pack
- Sponsor's Centrelink card
- Medical appointment letters for sponsor
- Appointment letters for sponsor from Jobs Statewide Employment Solutions
- Letter to sponsor from BT Super
- Centrelink Rent certificate letter addressed to sponsor
- AGL utility bills
- Tenancy rental history – July 2021 to May 2022

- Correspondence addressed to the sponsor (proof of address)
- Emeka Dunu Life Insurance Policy with AIA Australia Bronwyn Dunu Life Insurance Policy with AIA Australia
- Commonwealth Bank statement for account ending 7437 – March 2021 to March 2022
- Commonwealth Bank statement for account ending 2346 in name of E Dunu – December 2017 to June 2018
- Commonwealth Bank statement for account ending 7437 (joint account) – April 2021 to April 2022

22. The Tribunal has considered all aspects of the relationship. The Tribunal notes that in the period between the delegate's decision and the hearing before the Tribunal, it has been possible for the parties to gather and present additional relevant evidence for consideration. A substantial amount of additional and relevant evidence was presented prior to the hearing. This evidence all coincided with the cross-referenced questions answers at the hearing.

23. **Financial Aspects**

24. In relation to the financial aspects of the relationship between the applicant and the sponsor, the Tribunal has considered joint asset ownership, joint liabilities, pooling of financial resources, legal obligations and the sharing of daily household expenses. The delegate was not satisfied that the couple had demonstrated that the financial aspects of the relationship were consistent with two people in a genuine and continuing relationship.

25. The Tribunal accepts into evidence the following documents, which in addition to the many documents provided to the delegate at the time of the original decision, clearly demonstrate a degree of financial inter-dependence.

- Joint Commonwealth Bank statement – account ending 7437
- Joint AGL electricity account March 2019, Dec 2019, March 2020, June 2020, September 2020, March 2021
- Joint AGL gas account Jan 2019, Oct 2019, Jan 2020, Apr 2020, Jul 2020, Oct 2020, Feb 2021
- Emeka Dunu AIA application – 31 October 2019
- Bronwyn Dunu AIA life insurance letter – 1 November 2019
- Letter to sponsor from BT Super
- Centrelink Rent certificate letter addressed to sponsor
- Tenancy rental history – July 2021 to May 2022
- Correspondence addressed to the sponsor (proof of address)
- Emeka Dunu Life Insurance Policy with AIA Australia Bronwyn Dunu Life Insurance Policy with AIA Australia

- Commonwealth Bank statement for account ending 7437 – March 2021 to March 2022
 - Commonwealth Bank statement for account ending 2346 in name of E Dunu – December 2017 to June 2018
 - Commonwealth Bank statement for account ending 7437 (joint account) – April 2021 to April 2022
26. The joint bank account clearly demonstrates the pooling of financial resources as a couple. They demonstrate a transfer of monies to pay a joint rental agreement for their current housing. They also demonstrate the purchase jointly of day-to-day household items and food, pharmacy supplies and medications and the movement of monies into the account by both parties from individual bank accounts.
 27. Fixed Term Residential Tenancy Agreement, rental history, Centrelink rent certificate letter and the associated Bond Lodgement form, demonstrate joint tenancy responsibility and liability.
 28. Insurance policies listed and Superannuation policy clearly show the financial relationship between the couple.
 29. A substantial number of utilities bills show the joint financial and legal responsibilities associated with the relationship.
 30. The Tribunal places substantial weight on the forementioned evidence, much of which was cross-referenced at the hearing. It is satisfied that the applicant demonstrated that the financial aspects of the relationship were consistent with two people in a genuine and continuing relationship.
 31. **Nature of the Household**
 32. When assessing the nature of the household the Tribunal has considered the domestic living arrangements, shared household duties, daily routines and caring for children. The delegate was not satisfied that the couple were able to demonstrate, that the nature of their household, was consistent with two people in a genuine and continuing spousal relationship.
 33. The Tribunal accepts the evidence provided which indicates that the applicant and sponsor have jointly lived at the same addresses for a substantial period of time. Verifiable written evidence was provided of the residence in which they cohabited along with the secondary applicant for a period of approximately 4 years. In addition, the applicant and the sponsor verbally reinforced the evidence throughout the hearing.
 34. The delegate expressed concerns about the evidence presented, for example bank statements which indicate the sponsor's location at the time of activity and receipts for air travel, that demonstrate that the sponsor had spent substantial periods of time interstate. Therefore, they assumed this meant that the sponsor was not living with the applicant in their jointly claimed residence in South Australia for substantial periods of time. The delegate took this to indicate that a genuine relationship had ceased to exist.
 35. The Tribunal has formed a contrary view based upon its' substantial lived experiences associated with the expectations, clearly identified familial responsibilities and demands which are placed upon members of the extended family unit in Aboriginal families and communities. The sponsor was questioned in detail about her substantial absences when she claimed she was fulfilling her familial obligations. The visa applicant was likewise

questioned on the topic. The responses from both individuals coincide with the Tribunal's knowledge base and experiences. The Tribunal has formed the view that such absences which coincide with the location of family members is more likely to demonstrate the fulfilment of family obligations rather than the cessation of the couple's spousal relationship

36. Tradition household roles and their application in relation to the sponsor and the applicant were discussed during the hearing. Views were canvassed from the applicant and the sponsor as well as reference to the substantial number of Declarations placed before the Tribunal prior to the hearing, (paragraph 21 of this Decision). The Tribunal was satisfied of their correlation.
37. The Tribunal contemplated that such geographic dislocation and subsequent deprivation as a couple, in order, to fulfil family responsibilities, might under different circumstances and better understood cultural mores be viewed in a more favourable or positive light.
38. The Tribunal places substantial weight on this evidence. The Tribunal is satisfied that the applicant demonstrated that the nature of the household is consistent with two people in a genuine and continuing relationship.

39. Social aspects

40. In assessing the social aspects of the relationship, the Tribunal has considered social interactions, evidence of joint social activities, representation of their relationship to others and recognition of the relationship by friends and family
41. The applicants submitted a range of annotated photographs showing various social activities together or as a family unit with friends and their social or Church community. The photographs provided to the Tribunal were corroborated by verbal evidence and were in addition to the original photographs provided to the delegate. In relation to Statutory Declarations and written statements made by friends and colleagues, the Tribunal notes that the 5 additional Statutory Declarations explain their perceptions of the couple's ongoing relationship in more detail than the ones received by the delegate initially, prior to their decision. This is unsurprising as the delegate criticised the lack of detail and imprecise nature of the initial Statutory Declarations presented.
42. The Tribunal notes some of the positive statements made by community members indicating the social standing of the couple.
43. The documentary evidence clearly demonstrates the fact that the sponsor and the applicant are perceived as a family unit in their social sphere. Evidence of social engagements as a couple and a family unit was provided in written form by the forementioned Declarants and as oral evidence given during the hearing, by the applicant and sponsor.
44. The applicant and the sponsor were able with the body of evidence provided to demonstrate to the Tribunal that they represent themselves to the public, financial institutions, landlords, Tenancy Tribunal, utility providers, family members and friends as a married couple in a bona fide relationship. The Tribunal noticed the interpersonal behaviours exhibited during the hearing. This further encouraged it believe that the familial relationship was genuine.
45. The Tribunal places substantial weight on this evidence. The Tribunal is satisfied that the applicant and the sponsor demonstrated that the social aspects of the relationship were consistent with two people in a genuine and continuing relationship.
- 46.

47. Nature of the Commitment

48. In relation to the nature of the commitment, the Tribunal considered the nature of the parties first meeting, relationship development, length of time living together, degree of companionship and mutual emotional support and whether they see the relationship as long term.
49. In regards, to the development of the relationship, the department accepted that the couple have known each other for a substantial period of time and that were subsequently married. The Tribunal does not dispute these facts. This was correlated with verbal evidence given during the hearing.
50. The Tribunal accepts the range of written and verbal evidence demonstrating that the couple have predominantly lived under the same roof since the commencement of their married life. It also accepts that the sponsor has spent substantial amounts of time temporarily living interstate fulfilling her familial responsibilities. This does not indicate the cessation of the relationship. It is unsurprising to the Tribunal, that evidence was not presented to the delegate, that these trips were a temporary arrangement, the sponsor living interstate with family, so as, to fulfil the responsibilities that are considered socially appropriate in the sponsor's culture. The Tribunal also notes that this travel to see family has not occurred for the 2 years or more.
51. The Tribunal notes the medical evidence presented to it which indicates the degree of support and understanding of each-others physical challenges and the emotional reinforcement the couple provide each other. The understanding exhibited by the applicant in regards to his sponsor's medical conditions was at a level you would expect a committed partner would know.
52. The Tribunal has studied the photographic evidence provided to it which suggests a degree of emotional intimacy between the couple. It explored this with the sponsor and the applicant and found their answers did not dissuade it from this conclusion.
53. The not insubstantial evidence provided to the Tribunal detailing the couple's ongoing financial interdependence, liabilities and responsibilities, (detailed in paragraphs 24-28 of this Decision) shows strong evidence that the couple are mutually committed in an ongoing relationship. This was further reinforced by the general demeanour of the couple. The Tribunal once again notes, that the much of this evidence was not available to the delegate at the time of their decision.
54. The Tribunal has placed substantial weight on this evidence.
55. The Tribunal notes that the delegate, on 19 October 2017 approved the original 820 Partner (Temporary) (Class UK) visa, which was lodged on 21 June 2016. The delegate at the time clearly believed there was a genuine spousal relationship. The 801 Partner (Residence) (Class BS) visa, which was lodged at the same time as the 820 visa, which, was subsequently refused, as the delegate making that decision was not convinced that the spousal relationship was genuinely continuing. There is sufficient cumulative evidence before the Tribunal for it to conclude that the spousal relationship is ongoing and genuine.
56. For all of the above reasons, the Tribunal is satisfied that at the time of application and at the time of decision, the visa applicant and the sponsor were in a genuine and continuing relationship and have a mutual commitment to a shared life to the exclusion of all others, and lived together, or not separately and apart, on a permanent basis.

57. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore, the applicant meets cl.801.221.
58. For the reasons above, the applicant satisfies the criteria for the grant of the visa.
59. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.
- 60.

DECISION

61. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl 801.221 of Schedule 2 to the Regulations

Peter Emmerton
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).